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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

E L & ASSOCIATES, INC. et al., Plaintiffs and Respondents, v. WAYNE BENNETT, Defendant and Appellant.	A151434 (Alameda County Super. Ct. No. VG11581993)

In 1999, appellant Wayne Bennett, a certified public accountant, became the chief financial officer at respondent E L & Associates, Inc. (ELA), a company formed by respondent Ed Toy. In 2002, as fallout from the ".com bust" took effect, ELA reduced the salaries of all employees, including Bennett, a state of affairs that lasted for years. In 2011, Toy received a fraud alert on a credit card, investigation of which led to the conclusion that Bennett was involved in the incident—and much, much more. The upshot was Bennett's termination—and the within lawsuit.

ELA filed suit against Bennett for fraud and breach of fiduciary duty, seeking $1.5 million in damages, punitive damages, and prejudgment interest. Bennett filed a cross-complaint that among other things sought, what he claimed, was his deferred salary. Following a lengthy court trial, the court ruled for ELA, awarding it $793,142, to which it added compound interest.

Bennett appeals in a 70-page, 13,983-word opening brief that raises three issues, all of which, Bennett asserts, present pure questions of law: (1) the court committed reversible error in denying Bennett his deferred salary from 2003 through 2011; (2) the

court awarded excessive damages by denying Bennett credit for his contributions to the LLC affiliated with ELA; and (3) the court committed reversible error in awarding compound prejudgment interest. We disagree with Bennett that the issues raise pure questions of law. We also disagree with Bennett on the issues. And we affirm.

BACKGROUND

The Parties, the Participants, and the General Setting

Respondent ELA is a provider of engineering services for the design and manufacture of integrated circuits. ELA was formed in 1989 by respondent Ed Toy, an electrical engineer, and in 1992, it was incorporated as a California subchapter "S" corporation. Toy is married to Lauren Flaherty, and at the time of incorporation—and, it would develop, at all times since—they owned 100 percent of the stock in ELA, 50 percent each. ELA was a closely held business that often did not adhere to corporate formalities.

Appellant Wayne Bennett is an accountant by training, educated at Florida International University and Golden Gate University, from which he received his master's degree in accounting. Bennett became a certified public accountant, and over the years his clients came to include both Toy, whom he served as a personal accountant, and ELA. In October 1999, Bennett was hired to be the chief financial officer (CFO) at ELA, at a salary of $180,000.

Bennett's responsibilities at ELA were far reaching. They included maintaining the books and records, payroll, paying bills, and collecting invoices. He also prepared ELA's tax returns and managed its pension plan, as well as managing its bank relationships and employee administration and benefits. And he also managed ELA's business contracts, oversaw litigation brought by the company, and drafted scopes of work for projects. In short, Toy trusted Bennett to manage all aspects of the company's

finances, while he, Toy, focused on what he knew best, the design and manufacture of integrated circuits.[1]

For the first years of Bennett's employment, ELA was successful: gross revenue more than doubled between 1999 and 2000 and remained strong. Then the ".com bust" hit. As a result, in 2005 ELA reduced the salaries of all employees, including management, and thus Bennett's. As will be discussed below, the issue of Bennett's salary—what it was, what he claimed was lost, and what he was entitled to—became an issue at trial.

But while Bennett was not paid his full salary during the 2005–2011 period, he received, both directly and indirectly, significant benefits from ELA over those years. As to the direct, Bennett received some salary, and through cash transfers and checks to himself he "received" at least an additional $896,876. And as to the indirect, Bennett had an ELA credit card that he used for personal expenses, and between 2005 and 2011, he charged $428,384 on that credit card.[2] There apparently were other benefits, as the trial court would conclude that "the total amount in distributions from ELA accounts to Bennett between 2005 and 2011 (in salaries, checks/transfers, and personal credit card charges), was $1,471,593."

In 2009, Bennett was diagnosed with cancer, and he advised ELA that as of that July, he would go on disability leave and collect under ELA's disability insurance policy. At that same time, ELA agreed to hire Bennett's wife, Lisa Mitchell, to assume some of the administrative duties Bennett had been performing.[3] There was no agreement,

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[1] Toy's testimony describes the situation this way: "[Bennett's duties as CFO included] employee administration, maintaining employee files, benefits, employee handbook and so on, and any other administrative functions so I could focus on the technical and business development aspects" of the business.

[2] Toy, too, had a card, and also charged some personal expenses, but in a much smaller amount, $29,678.

[3] ELA's brief asserts that Bennett "induced ELA" to make the hire. Whatever the reason for the hire, by mid-2009, ELA had only one employee other than Toy.

indeed, even any discussion, regarding Mitchell's expected hours, her duties, or her benefits. Bennett, as CFO, was responsible for paying her salary.

Bennett submitted a claim to ELA's disability insurer representing that he was unable to work, and received $4,132 per month in disability insurance benefits. Bennett knew that he was not entitled to collect a salary while also receiving disability insurance benefits, and testified he did not expect to collect his entire salary in addition to the insurance benefits, and if he received a salary at the same time, he would refund a portion of the insurance payments. Moreover, Bennett understood that while he was collecting disability insurance benefits, he had to submit information concerning his income to the insurance company, aware that his insurance benefits would be adjusted based on his other income. Despite this, Bennett did not report the $114,373 he charged to ELA's credit cards in 2009 or the $256,865 in checks he paid himself from ELA.

While Bennett represented to ELA and the disability insurer that he was unable to work, he indicated contrary information to others. Thus, for example, in February 2010, he sought fulltime employment as a fiscal operations manager with the City and County of San Francisco. That same month, he applied for a job as an income tax preparer, representing in the application that he stopped working at ELA in 2009 and was semi-retired. And while on disability, Bennett also engaged in some private consulting as an accountant. Indeed, in November, Bennett represented to friends that he was cancer free and planning trips to New York City and Europe, and was healthy enough to plan a trip to Barcelona.

In March 2011, Toy received a fraud alert on a credit card, which in the past he had turned over to Bennett to investigate. This alert indicated that someone had purchased a $1,500 Lowe's gift card in New York, which seemed odd to Toy, so he decided to investigate it himself. Toy asked Bennett about it, and Bennett gave what Toy described as a nervous, garbled explanation, to the effect that he was the purchaser and needed to take advantage of a deal at Lowe's for home improvement items. Because Bennett was in New York for cancer treatments, and thus too ill to perform any work, Toy found the explanation odd. Toy looked at a few months of corporate American

Express billing statements, which unearthed a number of personal expenses charged by Bennett, including extensive travel and dining at fine restaurants, all while he was supposedly too weak and disabled to work.

Realizing that Bennett had control over all of ELA's and Toy's financial portals, Toy took steps to close off those portals and preserve whatever evidence he could. He also took steps to make backup copies of ELA's digital data, including QuickBooks records, and blocked Bennett's access to ELA's cash and credit. On April 28, Toy gave Bennett notice that his employment with ELA was suspended and he was not authorized to act in any way on behalf of ELA. And on May 31, he was terminated.

The Proceedings Below

On June 22, ELA, Toy, and Flaherty filed a complaint that asserted three claims against Bennett pertinent to this appeal: (1) intentional misrepresentation, (2) fraudulent concealment, and (3) breach of fiduciary duty.[4] The complaint prayed for over $1.5 million in damages, punitive damages, and prejudgment interest.

On July 13, Bennett filed an answer and a cross-complaint, which cross-complaint asserted three causes of action. The first two were on behalf of Bennett, for (1) fraud in the inducement and (2) unpaid wages in violation of the Labor Code. The third was on behalf of Mitchell, for unpaid wages.

In preparation for trial, Toy, assisted by Flaherty, spent hundreds of hours reconstructing the financial records of the company by reconciling digital and hard records, including bank accounts, credit cards, and loan files. Additionally, before trial commenced, and by stipulation of the parties, the trial court ordered the appointment of referee Ben C. Towne, CPA, to determine, among other things, the amounts of salary paid to Bennett for the years 2005–2009 and the amounts Bennett distributed from ELA to himself for the years 2005–2011. On January 31, 2014, the court adopted referee Towne's report (the Towne report) as an order of the court, it was marked and admitted

[4] The complaint also named Mitchell and Bennett's company, Malakoff & McIntyre, Inc., and asserted various claims against them. Those claims are not involved in the appeal here.

as a trial exhibit, and the court relied on it in its statement of decision. As to the ELA financial records pre-dating 2005, the trial court received documents and heard testimony.

The case proceeded to a bench trial that began on June 6, 2016. Testimony was taken for 11 days, and over 350 exhibits were introduced. The court also had before it a six-page statement of stipulated facts.

On September 20, the trial court issued its tentative decision. The tentative decision found Bennett liable to ELA for misrepresentation and concealment and for breach of fiduciary duty, and awarded $1 million in damages.

On October 6, Bennett filed a motion to reopen his case in chief, to introduce portions of trial exhibit 5184, the checks demonstrating Bennett's deposits to ELA. The trial court granted the motion without objection. Also on October 6, Bennett sought to amend his answer to conform to proof, to assert the affirmative defense of setoff pursuant to Code of Civil Procedure section 431.70.[5] The trial court denied this motion, finding that this issue was not properly raised by a motion to amend.

On October 21, ELA and its co-plaintiffs filed an ex parte application for a temporary protective order to prevent Bennett from concealing, transferring, or substantially impairing the value of real property assets while their application for writs of attachment were pending. The trial court granted the application.

On October 25, ELA and its co-plaintiffs filed an application for right to attach order against Bennett and his California real property. (See § 481.010 et seq.) They asserted that they were entitled to prejudgment attachment because their claims against Bennett for fraud and breach of fiduciary duties were quasi-contractual in nature. Bennett did not file opposition. On November 18, the trial court granted plaintiffs' application and entered an order for issuance of writ of attachment.

[5] All further unspecified statutory references are to the Code of Civil Procedure unless otherwise indicated.

On January 3, 2017, the trial court issued an amended proposed statement of decision and judgment.[6] Bennett filed objections asserting, as pertinent here, that: (1) the doctrine of election of remedies bars ELA from obtaining interest available for tort claims because it obtained a writ of attachment on a quasi-contractual theory; and (2) Bennett was entitled to a setoff for his affirmative wage claim and his affirmative defense of setoff pursuant to section 431.70. During the hearing on the objections to the proposed statement of decision, the court asked, "What would prevent the plaintiff from simply asking the court to vacate the sentence of either writ and then basically restore the case to what it was before?" Bennett's counsel responded, "I think the court has the inherent power to do that." And on February 23, the trial court vacated the writs of attachment nunc pro tunc.

On March 17, the trial court issued its statement of decision and partial judgment. The court found in favor of ELA, finding Bennett liable for breach of fiduciary duty including misrepresentation and concealment. The court awarded ELA $1,325,260, the total of the withdrawals the parties stipulated Bennett had made from ELA via the cash advances and credit card charges. Against that amount, the court credited Bennett with $177,951 for deposits he made to ELA, and $354,167 in salary for the years 2008 and 2009, resulting in a net award to ELA of $793,142. The decision also awarded interest, and in a subsequent order the court awarded ELA $669,178.76 in compound prejudgment interest.

On April 27, Bennett filed a motion for new trial, asserting four arguments: (1) the trial court erred by vacating the prejudgment attachment order nunc pro tunc; (2) testimony by Toy regarding his personal financial deterioration was irrelevant; (3) evidence of monies taken by Bennett prior to 2005 resulted in excessive damages; and (4) the trial court failed to determine Bennett's interest in ELA. The motion did not assert that the trial court erred by awarding compound interest. The trial court denied the motion on May 24.

[6] The trial court had previously issued another proposed statement of decision and judgment on October 20, 2016.

Thereafter, at the request of ELA as judgment creditor, the trial court issued orders of examination directed to Bennett and his wife Mitchell. One week after the scheduled date of the examinations, Bennett filed for bankruptcy.[7]

DISCUSSION

Introduction

The trial court's lengthy statement of decision was relatively measured, commenting little on the key participants and certainly not with many descriptive nouns or adjectives. Not so for the parties themselves, as witness the briefing here, whose briefs could not be more stark in their contrasting descriptions. Thus, for example, ELA's brief begins its introduction describing Bennett as a "typical fraudster," going on to describe how Toy's investigation into the suspicious credit card charges led to the evidence that over the years Bennett had "embezzled" hundreds of thousands of dollars from ELA. And, ELA says, "Bennett was stealing from ELA, Inc. since at least 2003," and the trial court "found that Bennett stole $1,325,260 through misrepresentation and concealment," which "theft was in breach of his fiduciary duties to ELA."[8]

The introduction to Bennett's brief describes him, somewhat blissfully, as a dedicated CFO who, despite his cancer diagnosis, continued "to help Toy with the company, in which Bennett feels invested as a co-owner. . . . [¶] At the time [i.e., 2009], and unrelated to his illness, Mr. Bennett [had] been voluntarily deferring his salary for seven years. He would defer salary for two more years. While Toy and Bennett were not drawing salaries, they both used company credit cards for personal expenses and would pay back the expenses over time. Toy knew that Bennett was using company credit cards

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[7] The bankruptcy court determined that this appeal can proceed.

[8] This assertion is followed by this: "For example, between 2003 and 2005, Bennett purchased expensive artwork at art galleries, using ELA, Inc.'s money. [Citations.] In 2004, he flew himself and his family to Florida for a family funeral, paid for two family funerals with ELA, Inc.'s credit cards, and then stole more money from the corporation in order to take his family to Los Cabos, Mexico to console themselves after the funerals. [Citations.] In 2008, Bennett used ELA, Inc.'s credit cards to pay for expensive repair work on his and his stepdaughter's cars."

to pay for personal expenses—even in his presence—and Toy was doing it too. [¶] But as the catastrophic effects of the Dot-Com Bust, and then the Great Recession, continued to constrict cash flow, Toy would turn on Bennett, taking issue with Bennett's charges made over the years. However, the extent to which Bennet[t] was charging personal expenses could have been no surprise because Bennett marked his personal charges in the books and records of the company for all to see. Nevertheless, Toy filed suit against Bennett." Or, as Bennett benignly describes it in his reply brief: "This appeal involves an *agreement* between Toy and Bennett, neither one an attorney, to use company credit cards during tight cash flows, and a subsequent disagreement over the scope of such use and the pace of repayment."

Much like the trial court, we will not wade in deeply on the personal side of the dispute. Having said that, we do note that to the extent the trial court made any observations or, more importantly, factual findings, they were all favorable to Toy—and adverse to Bennett. For example, discussing various "tax, loan and pension documents" and "entries in the books and records of ELA" that Bennett relied on in claimed support of his ownership in ELA, the court found that "[t]hese are documents prepared by Bennett or prepared under his direction so at best they reflect a good faith misunderstanding, rather than reality, and at worst, fraudulent misrepresentation."

Another example is the court's finding as to Bennett's use of ELA credit cards: "Even assuming that Toy and Bennett had earlier agreed they could use company credit cards to pay for living expenses, as Bennett testified, a reasonable person (much less CFO) would understand that 'living expenses' did not include personal expenses such as those incurred by Bennett in 2009 through 2011 for art, gifts to family members, or hotel and travel for vacations. Further, whether there was an implicit or explicit understanding that Bennett could charge personal expenses on company cards during his employment, had ELA, Inc. known the extent and nature of Bennett's personal credit card expenditures, it is not reasonable or credible that ELA, Inc. would have allowed Bennett to continue to use the cards for personal use, given the undisputed continued fragile financial condition of the company. Additionally the vast difference in personal credit

card use as between Toy and Bennett between 2005 and 2010 [*sic*] indicates that Bennett's extensive personal use of the company credit cards was not authorized, agreed upon, or known to ELA, Inc." And as to this, during the period 2005–2011, Bennett charged over $428,384 in personal expenses on ELA credit cards, Toy $29,678.

And there was abundant evidence of Bennett's improper use of the ELA credit cards, some of which was noted by the trial court, describing that Bennett's charges included "airfare, hotel and other vacation expenses in Hawaii and Mexico in 2007, in London and France in 2008; and in London, Paris and Italy in 2009 [and] (non-business related) airfare to Florida, Las Vegas, Hawaii and London." Bennett also charged over $13,000 for family parties, some $45,000 for artwork, and over $60,000 for his children's tuition. None of these charges was authorized by ELA.

Two paragraphs after its findings on credit cards, the court found that "the evidence indicates that the accounting performed by Bennett for ELA, Inc. is unreliable in important aspects, specifically in accurately tracking expenses or disbursements." Then, following brief discussion of some entries in the Towne report—and Bennett's claim that "nothing was concealed from ELA, Inc. or misrepresented in the books"—the trial court referred to an entry added to an account by Bennett, and concluded that "[t]his puts into question whether the documentation of Bennett's alleged repayments based upon the 404 Loan Account is complete or accurate, supporting the inference of concealment and misrepresentation on Bennett's part. Bennett suggests his personal credit card expenses and disbursement were not concealed because Toy had equal access to the books and records and that they were available to him on demand. Toy testified that he did not review the financial records that were apparently kept at Bennett's home office but reasonably relied upon Bennett, his CFO . . . to properly manage the firm's finances. In that regard, where a fiduciary relationship exists, as it did here, the usual duty of diligence to discover facts does not exist. *Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 202. In any event, even if Toy may have been negligent in his monitoring of the company finances, that does not excuse the failure to

disclose by Bennett, who had a fiduciary duty to the company not only to conduct himself as a reasonable CFO but also to refrain from self-dealing."

Based on the above, and more, the trial court concluded that "In light of the record, as a whole, . . . ELA, Inc. has established by a preponderance of the evidence that Bennett breached his fiduciary duty to ELA, Inc. and that this breach included making misrepresentations and concealments that were substantial factors in causing injury to ELA, Inc. The court finds that ELA, Inc. suffered monetary losses due to unauthorized and undisclosed withdrawals and personal credit card charges made by Bennett on ELA, Inc. accounts, and other damages as established by the evidence."

Finally, in connection with its analysis under section 431.70, the court discussed the equities of the situation, and following citation and discussion of several cases concluded as follows: "In this case, the court does not agree the equities favor allowing Bennett an offset for alleged unpaid wages otherwise time barred under Section 431.70. The record establishes that Bennett mismanaged the company's financial affairs, inter-mingled corporate accounts, and used unorthodox, sometimes improper, methods in his accounting. The record reflects that Bennett's unauthorized and extravagant use of company credit preceded 2005."

It is against that background that we analyze Bennett's appeal.

Denying Bennett the Set-Off Was Not an Abuse of Discretion

Bennett's first argument is that the trial court committed reversible error in denying him his salary from 2003 to 2011. Consistent with his treatment of the record, Bennett sets forth the facts in a fashion favorable to him, his argument on this issue beginning as follows: "Bennett was induced to join ELA on Toy's unfulfilled promise of ownership. [Citations.] Of course, Bennett did not know that Toy would not fulfill his promise. So when the Dot-Com Bust hit and later the Great Recession, Bennett willingly deferred his salary *for nine years*. [Citation.][9] While Bennett deferred his salary, he

[9] Contrary to the assertion in the brief, Bennett's claim in his complaint was not that he was induced to join ELA on a promise of ownership, but that "[c]ommencing in

never agreed to work for free. [Citations.] To do so would be astounding given that he was owed some $1.1 million in salary when he was terminated. [Citation.] [¶] . . . . Yet despite the nine years of deferred salary the court recognized, it refused to award Bennett anything more than two-years' worth—a fraction of what he was owed—penalizing Bennett and stating that such a penalty is 'equitable.' [Citations.] That was reversible error."

Bennett is wrong.

To put the issue in perspective, Bennett agreed in 2005 to a reduced salary, from $180,000 to $120,000. As to this, the trial court would conclude that the reduction was only for one year, holding, "[t]he parties dispute the amount of salary Bennett was entitled to receive in the years 2005 forward. No documents exist that set forth Bennett's salary at any point during his employment but it [was] not disputed that his initial base salary was $180,000. Toy claims Bennett agreed to reduce his salary to $120,000 in 2005. . . . The records reflect that Bennett was only paid $120,000 in salary in 2005 consistent with this testimony. However, there is nothing in the record to indicate that this reduction, assuming it was agreed upon, was to continue year after year and it does not explain why Bennett received salary payments of only $5,500 in 2006, $15,000 in 2007, $5[,]833 in 2009 and nothing in 2008, 2010 or 2011. (Towne Report, Section A, p. 2.) In light of the foregoing, the court concludes that Bennett's annual base salary was $180,000, excluding 2005."

"Actions for final wages not paid as required by [Labor Code] sections 201 and 202 are governed by Code of Civil Procedure section 338, subdivision (a), which provides that a three-year statute of limitations applies to '[a]n action upon a liability created by statute, other than a penalty or forfeiture.' " (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1395.) Bennett did not file his cross-complaint until July 13, 2011, and so, as the trial court held, he was not entitled to recover unpaid wages earned prior to July 13, 2008. As a result, Bennett pleaded a right to an offset of earlier claimed

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2004" Toy made representations to Bennett to "stay employed." Moreover, there is no evidence Bennett agreed to "defer" his salary, only that he agreed to a reduced salary.

deferred salary against any judgment ELA might recover, an offset based on section 431.70.[10] The trial court addressed Bennett's offset claim in its statement of decision, as follows:

"As an affirmative defense, Bennett argues that pursuant to [section] 431.70, he is entitled to offset otherwise time-barred unpaid wages owed to him (2005 to mid-2008) from the total amount of damages awarded ELA, Inc. He also argues that to the extent the court determines Bennett is not entitled to unpaid wages because he received compensation in the form of draws and credit card usage, the total award to ELA, Inc. must be reduced by the amount of 'compensation' because otherwise the award includes improper double recovery. . . .

"The parties acknowledge that relief under [section] 431.70 for offset is an equitable exercise by the court. ' "One who seeks equity must do equity" is a fundamental maxim of equity jurisprudence. [Citations.] It is often stated that a court will not grant equitable relief unless the [defendant] acknowledges or provides for the [plaintiff's] equitable rights arising from the same subject matter.' [Citation.] 'A court applying an equitable defense must exercise its discretion by considering the relative equities of the parties with respect to the conduct relevant to the particular cause of action.' [Citation.] 'Dependent on the character of the misconduct involved and the severability of the services rendered, an agent's fraud against his principal or some other serious breach of fealty on his part will defeat the agent's right to compensation either in whole or to an extent equivalent to the injury caused by the principal by his offensive conduct.' [Citations.] As noted above, a court may disallow compensation for services

[10] Section 431.70 provides in pertinent part as follows: "Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statute of limitations. If the cross-demand would otherwise be barred by the statute of limitations, the relief accorded under this section shall not exceed the value of the relief granted to the other party."

rendered by a fiduciary which were covered with a taint of fraud. [Citation.] Moreover compensation may be refused for work not properly performed. [Citation.] In this case, the court does not agree the equities favor allowing Bennett an offset for alleged unpaid wages otherwise time barred under Section 431.70. The record establishes that Bennett mismanaged the company's financial affairs, inter-mingled corporate accounts, and used unorthodox, sometimes improper, methods in his accounting. The record reflects that Bennett's unauthorized and extravagant use of company credit preceded 2005. Defendant suggests that unless otherwise awarded an offset, he essentially 'worked for free.' That is not correct. Defendant Bennett enjoyed the use of significant unauthorized distributions of cash and ELA, Inc. credit (essentially tax free income) all during his employment, which malfeasance put the company at financial risk.[11]"

Eschewing any reference to the trial court's observation that the parties, obviously including Bennett, "acknowledge[d] that relief under [section] 431.70 for offset is an equitable exercise by the court," Bennett cites an 1898 case for the proposition that the right to a setoff is mandatory. This is how Bennett's brief puts it: " 'In every case the suitor has the right to ask for . . . set-off, and in every proper case, *as of right*, the motion should be granted.' (*Haskins v. Jordan* (1898) 123 Cal. 157, 160, emphasis added; see § 431.70.) '[H]owever much or little the courts may have permitted themselves to be influenced by equitable considerations[,] . . . in this state *there is no room for the exercise of discretion* upon the question.' (*Id.* at pp. 161–162, emphasis added; accord, *Highsmith* [*v. Lair* (1955)] 44 Cal.2d [298], 302–303; *Harrison v. Adams* (1942) 20 Cal.2d 646, 649.) 'The rule is one rigidly fixed by statute, and under it' a plaintiff's right to recover on a judgment is 'subject to the right' of a defendant to setoff. (*Haskins, supra,* 123 Cal.

[11] "The court notes that the Towne Report reflects that as a result of cash flow problems Toy deposited $524,567 of personal funds to keep the company afloat (Towne Report, Section G, p. 6). It is also noted that ELA Inc. distributed 2,830 Cisco Corporation shares to Bennett in 2005 worth $48,166.60. (Towne Report, Section B, p. 3)."

at pp. 161–162.)" *Haskins v. Jordan, supra,* 123 Cal. 157 (*Haskins*), the case relied on by Bennett, is inapplicable.[12] And the law is otherwise.

Kruger v. Wells Fargo Bank (1974) 11 Cal.3d 352, is instructive, the Supreme Court there noting that California's current statutory provisions emanate from "the established principle *in equity* that either party to a transaction involving mutual debts and credits can strike a balance, holding himself owning or entitled only to the net difference . . . ." (*Id.* at p. 362, italics added.) In light of this equitable origin, numerous California decisions have recognized that the "right to setoff is not absolute, but may be restricted by judicial limitations imposed to uphold [an independent] state policy . . . ." (*Id*. at pp. 367–368 & cases cited at fn. 24.) Or, as *Kruger* earlier described it, any right of setoff "while recognized by the statute, was not created by it. The right is grounded in general principals of equity. 'In equity, a setoff . . . depends, not upon the Statutes of Set-off, but upon the equitable jurisdiction of the Court over its suitors.' *Hobbs v. Duff*, [(1863)] 23 Cal. 596, 629." (*Id.* at p. 363; accord, *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 750 ["equitable defense of setoff"]; *Jess v. Herrmann* (1979) 26 Cal.3d 131, 142 ["right to setoff is not absolute"].)

Estate of Smith (1954) 123 Cal.App.2d 844, discussed former section 440 of the Code of Civil Procedure, the predecessor of section 431.70, noting that "[t]he right of setoff is based on [an] equitable principle . . . ." (*Id.* at p. 848.) *Wm. R. Clarke Corp. v. Safeco Ins. Co. of America* (2000) 78 Cal.App.4th 355, 358–359 distilled the law this way: "The right to a setoff is not absolute and may be restricted when the failure to do so would be inequitable. (*Advance Industrial Finance Co. v. Western Equities, Inc.* (1959) 173 Cal.App.2d 420, 426–427 [a claim held by assignment does not as a matter of law give rise to setoff rights, and the assignee's right to an offset may be denied in certain instances]; *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 4–5; *Federal Deposit Ins. Corp. v. Bank of America* (9th Cir. 1983) 701 F.2d 831, 836–837; see also

[12] *Highsmith* and *Harrison* involve setoffs under section 368, which is not involved here.

Harrison v. Adams (1942) 20 Cal.2d 646, 650 [in determining whether to allow the equitable right of setoff, a court will consider the positions of the real parties in interest].) It follows that the trial court's decision was one subject to an exercise of its equitable powers, and that the only issue before us on this appeal is whether that discretion was so abused that it resulted in a manifest miscarriage of justice."

Haskins, supra, 123 Cal. 157, the case cited by Bennett, is not availing. The issue there involved two judgments, one for plaintiff Haskins, and one against him. The trial court denied a motion to set off one judgment against the other. The Supreme Court reversed, holding as follows: "Jordan having acquired the Crossman judgment, there can be no doubt that the procedure which he adopted, that of going into the court which had rendered a judgment against him, and there seeking to offset the judgment assigned to him against the judgment adverse to him, was a regular and well-authorized course to pursue. The power to set off one judgment against another exists independent of statute, and rests upon the general jurisdiction of courts over their suitors and processes." (*Id.* at p. 160.) There are not two judgments here. And what Bennett urged was not a "regular and well-authorized course to pursue."

In sum, the setoff issue is an equitable one, an issue the court decided against Bennett, in a thoughtful, considered application of the facts before it as quoted above. That decision was not " 'so irrational or arbitrary that no reasonable person could agree with it.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) It was not an abuse of discretion.

Denying Bennett Credit for LLC Contributions Was Not Error

As noted, in 1999 Bennett went to work for ELA, which in 2002 became a corporation. It was the corporation that sued him, and the corporation against which he cross-complained. Bennett's second argument, set forth in a brief 29 lines, is that the trial court erred in denying him credit for what he claims is $99,250 in contributions he made to the LLC.

To put the argument in perspective, in 2005, six years after Bennett began employment at ELA, Toy, Bennett, and others decided to form E L & Associates LLC

(the LLC), apparently formed to enter the design market for chips, to complement ELA's focus on engineering. The LLC was separate from ELA, with separate Articles of Incorporation filed with the Secretary of State. And the LLC quickly failed, disbanding in September 2006, a year after its inception, by agreement of all the partners, "dissolved in debt."

Because of its brevity, Bennett's second argument is not well developed. As best we understand it, it is that the "LLC assets and liabilities were 'folded into' or 'absorbed by' ELA, Inc. when the LLC was unwound." And, so Bennett's argument runs, denying him these contributions is "facially inconsistent with the trial court's order penalizing him for his draws out of the same LLC." We are not persuaded.

As a matter of law, ELA and the LLC are distinct legal entities with separate and distinct liabilities and obligations. Bennett advances no plausible legal theory as to why his contributions to the LLC should be deducted from ELA's judgment. But even assuming Bennett's LLC contributions could offset ELA's judgment, there was good reason to support the trial court's conclusion not to allow the offset here.

First, as its tax returns demonstrated, the LLC was a failed venture. Those returns show that in 2005 the LLC lost $162,398, and its final 2006 return states that it lost $339,843 that year and had no assets. At the end, the LLC had only debts, which became ELA's responsibility.

Second, Toy, who contributed approximately $500,000 to the LLC, lost this investment when the venture failed. Likewise, any contribution Bennett actually made to the LLC was lost when the venture failed and dissolved in debt. In short, everyone suffered a loss over the LLC and just walked away, with ELA paying off its debts.

In sum, the trial court properly rejected Bennett's attempt to obfuscate the relationship between ELA and the LLC. The LLC's final 2006 tax returns show that it had no assets, only debts, which, Toy testified, ELA paid off. And all LLC members forfeited their investments in the company. Against that background, the trial court found that Bennett's contributions to the LLC would not be credited against ELA's damages claim. The finding is fully supported.

The Award of Prejudgment Interest Was Not Error

Civil Code section 3288 provides that "In an action for the breach of an obligation not arising from contract, . . . interest may be given, in the discretion of the jury." (See *Greater Westchester Homeowners Assn v. City of Los Angeles* (1979) 26 Cal.3d 86, 102.) Though Civil Code section 3288 speaks in terms of "the jury," interest is deemed to be an issue for the trier of fact, and a judge in a nonjury trial may also award prejudgment interest. (*Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 814.)

The trial court awarded ELA prejudgment interest, its statement of decision holding as follows: "Plaintiff[s] request that pre-judgment interest be awarded. When, by virtue of a defendant's fraud or breach of fiduciary duty, a plaintiff has been deprived of the use of money or property and is obliged to resort to litigation to recover it, the inclusion of interest in the award is necessary to make the plaintiff whole. *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1586; *Nordahl v. Department of Real Estate* (1975) 48 Cal.App.3d 657, 665. Where a fiduciary breaches his duties, an award of compound interest is warranted. *Michelson*[, at page] 1586." The court thereafter awarded compound interest.

Bennett's final argument is that such an award was error. The argument has four subarguments, the first of which is that any award of interest was improper because ELA benefitted from the use of Bennett's salary and capital contributions, that "ELA enjoyed the use of Bennett's deferred salary—essentially an interest-free loan—during the prejudgment period." And the argument continues, the purpose of "prejudgment interest is not to punish the defendant . . . " but to "make the plaintiff whole." Bennett's second subargument, set forth in less than one page, is related to the first, that even if prejudgment interest was proper, the court erred by failing to first reduce the judgment by Bennett's entire deferred salary. In claimed support, Bennett's brief refers back to his first substantive argument, which, we concluded, has no merit. That conclusion answers Bennett's first two subarguments here.

Bennett's third subargument is that the award of compound interest was improper because "only simple prejudgment interest is allowable." Elaborating, Bennett asserts

that "The trial court relied on outdated case law approving compound prejudgment interest awards in certain fiduciary duty cases, and a single modern case assuming, but not actually deciding, that compound prejudgment interest is still available in fiduciary duty cases (*Michelson*[, *supra*,] 29 Cal.App.4th 1566)." We disagree.

Michelson v. Hamada, supra, 29 Cal.App.4th 1566 (*Michelson*), the so-called "single modern case," is persuasive. Michelson, a surgeon, brought an action against another doctor asserting claims for breach of fiduciary duty, fraud, and breach of contract. The jury found for Michelson and awarded compound prejudgment interest. (*Id.* at p. 1575.) Defendant appealed, arguing that compound interest should not be awarded because it is only authorized in trustee cases involving defendants acting as fiduciaries. (*Id.* at p. 1586.) The court rejected the argument, holding as follows: "As we have previously discussed, Hamada stood in a fiduciary relationship with Michelson and the jury found that he breached his fiduciary duty. These cases confirm that an award of compound interest *is appropriate* in this type of case." (*Id.* at p. 1586.)

Bennett argues that the court's reliance on *Michelson* was "misplaced" because in that case the "defendant did not appear to challenge the trial court's assumptions regarding compound interest below or on appeal. [Citation.] As a result, the *Michelson* court had no occasion to consider the line of cases holding that prejudgment interest is simple unless otherwise provided by statute (e.g., *Salton Bay* [*Marina, Inc. v. Imperial Irrigation Dist.* (1985)] 172 Cal.App.3d [914] at p. 961.)" We read *Michelson* differently. And disagree with Bennett's argument about the requirement of statutory authority. The leading practical commentary for civil trials provides—in point-blank terms yet—that "in actions involving *breach of fiduciary duties*, an award of *compound* interest is appropriate. *Michelson,* [*supra*, 29 Cal.App.4th at p.] 1587 . . . ." (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2017) ¶ 18:190, p. 17-209.) Nothing is said about any statutory requirement. (See generally *Baker v. Pratt* (1986) 176 Cal.App.3d 370, 383–384 ["When a trustee willfully converts trust property to his own use, he is liable for interest, even though it may not have been prayed for in the complaint. The circumstances of the case determine whether the interest awarded is

simple or compound. In cases of mere negligence, no more than single interest is ever added to the loss or damage resulting therefrom, but if the trustee is guilty of some positive misconduct or willful violation of duty, the court may award compound interest"].)

As indicated, Bennett's position as to the claimed need for statutory authority is based on *Salton Bay Marina, Inc. v. Imperial Irrigation Dist., supra*, 172 Cal.App.3d 914, 961. There, in an inverse condemnation case, the trial court awarded compound interest, and the Court of Appeal affirmed. Doing so, the court said this: "As a general rule, compound interest is impermissible unless specifically authorized by statute or by stipulation of the parties. (*Estate of Sharp* (1971) 18 Cal.App.3d 565, 585; *State of California v. Day* (1946) 76 Cal.App.2d 536, 554.)" *Estate of Sharp* said the same thing, citing only *Day*. And *Day* did not involve a fiduciary. Beyond all that, as best we can tell, this portion of *Salton Bay* has never been cited in a published opinion.

Bennett's final subargument asserts that compound interest was not proper because ELA made an election of remedies. The basis of the claim is that ELA obtained writs of attachment on two of Bennett's real properties premised on the assertion that prejudgment writs of attachment were available because its claims sounded "quasi-contractual."[13] After the writs of attachment issued, ELA sought to revoke the writs, and over Bennett's objection, the court vacated its prior attachment order "nunc pro tunc." Bennett argues that such election was irrevocable. We reject the argument.

Election of remedies refers to the act of choosing between concurrent but inconsistent remedies based upon the same set of facts. (See *Baker v. Superior Court* (1983) 150 Cal.App.3d 140, 144.) The doctrine is an application of equitable estoppel

[13] The request for a writ of attachment here was made after the trial court's tentative decision, which included findings and conclusions of law that Bennett committed fraud and breach of fiduciary duty, and was liable for damages totaling over $1 million plus interest. In short, this was not an attachment in the typical sense, but rather a short-term restraining order to prevent asset transfer between the end of the trial and the entry of judgment.

(*id.* at p. 145), the rationale being that when a plaintiff has pursued a remedy that is inconsistent with an alternative remedy and thereby causes the defendant substantial prejudice, plaintiff should be estopped from pursuing the alternative remedy. (*Ibid.*) "[T]he doctrine does not apply to forfeit tort claims unless the defendant has suffered 'substantial prejudice' as a result of the plaintiff's attachment." (*Waffer Internat. Corp. v. Khorsandi* (1999) 69 Cal.App.4th 1261, 1279.)

The doctrine is not favored. As Witkin begins his discussion of the subject: "The doctrine of election of remedies, often invoked in the earlier cases, has been repeatedly criticized and seems to be falling into disfavor. Later California decisions illustrating binding election are comparatively rare, and the bar to a remedy is sustained on the principles of estoppel or res judicata rather than election. 'At best this doctrine . . . is a harsh, and now largely obsolete rule, the scope of which should not be extended.' [Citations.] [¶] Modern writers have contended that the only sound explanation for a doctrine of election of 'remedies' is that, in some situations, there may be a required choice of substantive rights. Thus, no person would be entitled to claim two inconsistent rights [citation], but a person would be free to select and change his or her alternative remedies or legal theories of recovery, by amending the complaint or by filing a new action, until such time as one of the inconsistent rights was finally vindicated by the satisfaction of a judgment or by the application of the doctrine of res judicata or estoppel." (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 180, pp. 260–261.)

In short, we are to view Bennett's arguments with a jaundiced eye. Doing so, we reject the argument, for several reasons.

Election of remedies is an affirmative defense that ordinarily must be specially pleaded, and will be waived if not timely raised. (*Roam v. Koop* (1974) 41 Cal.App.3d 1035, 1044.) Indeed, as *Baker* noted in the precise situation present here, a defendant should be required to raise any election of remedies defense in opposition to the plaintiff's attachment application in the first instance. (*Baker v. Superior Court, supra,* 150 Cal.App.3d at p. 147, fn. 5.)

Here, Bennett did not oppose ELA's October 2016 ex parte application for temporary protective order, and did not object to ELA's applications for the right to attach order, or its entry. Rather, Bennett waited to raise this issue until January 13, 2017, in his objections to the proposed amended statement of decision. Bennett thus waived any affirmative election of remedies defense by failing to raise it at his first opportunity.

But even if Bennett did not waive this issue by failing to raise it at the first opportunity, he expressly waived it by agreeing that the trial court had the authority to revisit its order. That is, when the issue was argued, the court asked Bennett's counsel, "What would prevent the plaintiff from simply asking the court to vacate the sentence of either writ and then basically restore the case to what it was before?" Counsel responded that "the court has the inherent power to do that." And it did. This was within the court's inherent power. (See generally *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1097; *In re Marriage of Barthold* (2008) 158 Cal.App.4th 1301, 1305.)

Finally, the trial court held that Bennett was not prejudiced.

DISPOSITION

The judgment is affirmed. ELA shall recover its costs on appeal.

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Richman, J.

We concur:

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Kline, P. J.

_____
Miller, J.

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